

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

EDWARD ELRY MORRISON,

Petitioner,

vs.

JIM BENEDETTI, Acting Warden, et al.,

Respondents.

Case No. 3:07-cv-00295-LRH-(VPC)

**ORDER**

Before the Court are the Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (#2), Respondents' Answer (#32), and Petitioner's Reply (#35). The Court finds that relief is not warranted, and it denies the Petition (#2).

After a jury trial in the Eighth Judicial District Court of the State of Nevada, Petitioner was found guilty of burglary and petit larceny. The trial court treated Petitioner as a habitual criminal, pursuant to Nev. Rev. Stat. § 207.010; he received a sentence of life imprisonment with the possibility of parole after 10 years for burglary, and a concurrent sentence for petit larceny with a minimum of 5 years and a maximum of 10 years in prison. Ex. 7 (#21-3, p. 7).<sup>1</sup> Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 17 (#21-5, p. 18). Petitioner then filed in the state district court a post-conviction habeas corpus petition. Ex. 19 (#21-6, p. 1). The district

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<sup>1</sup>Page numbers in parentheses refer to the images of the documents in the Court's computer docket.

1 court denied the petition. Ex. 22 (#21-7, p. 29). Petitioner appealed, and the Nevada Supreme  
 2 Court affirmed. Ex. 24 (#21-8, p. 1).

3 Petitioner then commenced this action. The Court dismissed Ground 1 because it  
 4 determined that Petitioner had received a full and fair opportunity to litigate that Fourth Amendment  
 5 claim in the state courts. Order (#6) (citing Stone v. Powell, 428 U.S. 465, 481-82 (1976)). The  
 6 Court dismissed the speedy-trial claims in Ground 3 because Petitioner had procedurally defaulted  
 7 them. Order (#26). Ground 2, and the part of Ground 3 that alleges ineffective assistance of  
 8 counsel, remain.

9 On direct appeal, the Nevada Supreme Court summarized the facts established at trial:

10 Taken into custody on suspicion in an unrelated offense, Morrison consented to a  
 11 search of his backpack, which contained two women's sweat suits (with Macy's  
 12 department store price tags attached), an evening dress, and cosmetics. Police  
 13 detectives contacted a Macy's loss prevention officer about the clothing and  
 14 discovered that a person matching Morrison's description had recently been involved  
 15 in an incident at the store. The loss prevention officer observed Morrison acting  
 16 suspiciously, namely that Morrison walked around the women's department with  
 several articles of clothing draped over his arm and then moved behind a partition  
 out of the surveillance camera's view. He emerged from behind the partition  
 carrying a full plastic Macy's bag, with the clothing no longer draped over his arm.  
 Morrison bypassed the cash registers and left the store. Morrison was charged with  
 burglary and petit larceny. At trial, all but one of the clothing items discovered in  
 Morrison's backpack were identified as coming from the Macy's store.

17 Ex. 17, pp. 3-4 (#21-5, pp. 22-23).

18 "A federal court may grant a state habeas petitioner relief for a claim that was adjudicated on  
 19 the merits in state court only if that adjudication 'resulted in a decision that was contrary to, or  
 20 involved an unreasonable application of, clearly established Federal law, as determined by the  
 21 Supreme Court of the United States,'" Mitchell v. Esparza, 540 U.S. 12, 15 (2003) (quoting 28  
 22 U.S.C. § 2254(d)(1)), or if the state-court adjudication "resulted in a decision that was based on an  
 23 unreasonable determination of the facts in light of the evidence presented in the State court  
 24 proceeding," 28 U.S.C. § 2254(d)(2).

25 A state court's decision is "contrary to" our clearly established law if it "applies a  
 26 rule that contradicts the governing law set forth in our cases" or if it "confronts a set  
 27 of facts that are materially indistinguishable from a decision of this Court and  
 28 nevertheless arrives at a result different from our precedent." A state court's decision  
 is not "contrary to . . . clearly established Federal law" simply because the court did  
 not cite our opinions. We have held that a state court need not even be aware of our

1 precedents, “so long as neither the reasoning nor the result of the state-court decision  
2 contradicts them.”

3 Id. at 15-16. “Under § 2254(d)(1)’s ‘unreasonable application’ clause . . . a federal habeas court  
4 may not issue the writ simply because that court concludes in its independent judgment that the  
5 relevant state-court decision applied clearly established federal law erroneously or incorrectly.  
6 Rather, that application must be objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63, 75-76  
7 (2003) (internal quotations omitted).

8 [T]he range of reasonable judgment can depend in part on the nature of the relevant  
9 rule. If a legal rule is specific, the range may be narrow. Applications of the rule  
10 may be plainly correct or incorrect. Other rules are more general, and their meaning  
11 must emerge in application over the course of time. Applying a general standard to  
12 a specific case can demand a substantial element of judgment. As a result,  
13 evaluating whether a rule application was unreasonable requires considering the  
14 rule’s specificity. The more general the rule, the more leeway courts have in  
15 reaching outcomes in case-by-case determinations.

16 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

17 “Rule 7 of the Rules Governing § 2254 cases allows the district court to expand the record  
18 without holding an evidentiary hearing.” Cooper-Smith v. Palmateer, 397 F.3d 1236, 1241 (9th Cir.  
19 2005). 28 U.S.C. § 2254(e)(2) restricts the availability of an evidentiary hearing when the petitioner  
20 fails to develop the factual record in the state courts; its requirements apply to a Rule 7 expansion of  
21 the record, even without an evidentiary hearing. Cooper-Smith, 397 F.3d at 1241. “An exception to  
22 this general rule exists if a Petitioner exercised diligence in his efforts to develop the factual basis of  
23 his claims in state court proceedings.” Id.

24 The petitioner bears the burden of proving by a preponderance of the evidence that he is  
25 entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

26 Ground 2 contains several claims regarding Petitioner’s treatment as a habitual criminal.  
27 First, Petitioner alleges that he was not properly charged, because the criminal complaint filed in the  
28 justice court charged him with petit larceny, a misdemeanor, while the information filed in the

1 district court after he was bound over for trial charged him with petit larceny, a category B felony.<sup>2</sup>  
 2 The Nevada Supreme Court held that this claim was procedurally barred because Petitioner could  
 3 have raised it on appeal. Ex. 24, p. 9 (#21-8, p. 10) (citing Nev. Rev. Stat. § 34.810). As the Court  
 4 explained in its earlier Order (#26), that ground for dismissal is an adequate and independent state  
 5 rule that precludes federal review of this claim. Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir.  
 6 2003). This part of Ground 2 is procedurally defaulted.

7 Second, Petitioner argues that the sentencing court did not make particularized findings of  
 8 fact that it was just and proper to treat him as a habitual criminal. On this issue, the Nevada  
 9 Supreme Court held:

10 Finally, Morrison argues that the district court abused its discretion in adjudicating  
 11 him a habitual criminal by failing to weigh appropriate factors for and against  
 12 imposing the habitual criminal enhancement. Specifically, he argues that the district  
 13 court's comments during sentencing do not reflect any rational consideration of the  
 appropriateness of the enhancement. He further contends that the district court  
 abused its discretion in adjudicating him a habitual criminal because the prior  
 felonies upon which the enhancement was premised were stale and trivial.

14 We have held that "as long as the record as a whole indicates that the sentencing  
 15 court was not operating under a misconception of the law regarding the discretionary  
 16 nature of a habitual criminal adjudication and that the court exercised its discretion,  
 17 the sentencing court has met its obligation under Nevada law." Here, we conclude  
 18 that the district court did not abuse its discretion in relying on Morrison's five prior  
 felony convictions in adjudicating him a habitual criminal. We further conclude that  
 the record demonstrates that the district court properly exercised its discretion in  
 determining that such an adjudication was warranted in this case.

19 Ex. 17, p. 5 (#21-5, p. 24) (citing Hughes v. State, 996 P.2d 890, 893-94 (Nev. 2000) (per curiam)).  
 20 Contrary to Petitioner's argument, Nev. Rev. Stat. § 207.010 does not require particularized findings  
 21 of fact. Tilcock v. Budge, 538 F.3d 1138, 1144 (9th Cir. 2008) (citing O'Neill v. State, 153 P.3d 38  
 22 (Nev. 2007), Hughes v. State, 996 P.2d 890 (Nev.2000) (per curiam)). The transcript of the  
 23 sentencing hearing shows that the judge considered the arguments of both sides before deciding to  
 24 impose the habitual criminal enhancement. Ex. 6 (#21-3, p. 1). This part of Ground 2 is without  
 25 merit.

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27 <sup>2</sup>Petitioner was charged pursuant to the small habitual criminal provision, which elevates  
 28 petit larceny to a category B felony. See Nev. Rev. Stat. § 207.010(a).

1 Third, Petitioner argues that the decision to treat him as a habitual criminal violates various  
2 provisions of the Constitution of the State of Nevada. This part of Ground 2 is not addressable in  
3 federal habeas corpus, because this Court can grant Petitioner relief “only on the ground that he is in  
4 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.  
5 § 2254(a).

6 Fourth and last, Petitioner argues that appellate counsel provided ineffective assistance. This  
7 claim duplicates the ineffective-assistance claim in Ground 3.

8 The remaining part of Ground 3 contains multiple claims of ineffective assistance of trial  
9 counsel, sentencing counsel, and appellate counsel. “[T]he right to counsel is the right to the  
10 effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970). A  
11 petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney’s  
12 representation “fell below an objective standard of reasonableness,” Strickland v. Washington, 466  
13 U.S. 668, 688 (1984), and (2) that the attorney’s deficient performance prejudiced the defendant  
14 such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of  
15 the proceeding would have been different,” id. at 694. “[T]here is no reason for a court deciding an  
16 ineffective assistance claim to approach the inquiry in the same order or even to address both  
17 components of the inquiry if the defendant makes an insufficient showing on one.” Id. at 697.

18 Strickland expressly declines to articulate specific guidelines for attorney performance  
19 beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the  
20 duty to advocate the defendant’s cause, and the duty to communicate with the client over the course  
21 of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel’s duties so  
22 exhaustively as to give rise to a “checklist for judicial evaluation of attorney performance. . . . Any  
23 such set of rules would interfere with the constitutionally protected independence of counsel and  
24 restrict the wide latitude counsel must have in making tactical decisions.” Id. at 688-89.

25 Review of an attorney’s performance must be “highly deferential,” and must adopt counsel’s  
26 perspective at the time of the challenged conduct to avoid the “distorting effects of hindsight.”  
27 Strickland, 466 U.S. at 689. A reviewing court must “indulge a strong presumption that counsel’s  
28 conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

1 overcome the presumption that, under the circumstances, the challenged action ‘might be considered  
2 sound trial strategy.’” Id. (citation omitted).

3 The Sixth Amendment does not guarantee effective counsel per se, but rather a fair  
4 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.  
5 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell  
6 below an objective standard of reasonableness alone is insufficient to warrant a finding of  
7 ineffective assistance. The petitioner must also show that the attorney’s sub-par performance  
8 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that,  
9 but for the attorney’s challenged conduct, the result of the proceeding in question would have been  
10 different. Id. at 694. “A reasonable probability is a probability sufficient to undermine confidence  
11 in the outcome.” Id.

12 If a state court applies the principles of Strickland to a claim of ineffective assistance of  
13 counsel in a proceeding before that court, the petitioner must show that the state court applied  
14 Strickland in an objectively unreasonable manner to gain federal habeas corpus relief. Woodford v.  
15 Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

16 Petitioner presents twenty-three instances of ineffective assistance his trial counsel, Craig  
17 Jorgenson. The Nevada Supreme Court considered five of them in detail. First, he claims that  
18 Jorgenson failed to challenge an erroneous information that charged him with a felony for petit  
19 larceny rather than a misdemeanor for petit larceny. The Nevada Supreme Court held:

20 Morrison first contended that trial counsel Craig Jorgenson was ineffective for failing  
21 to challenge an allegedly erroneous information, which he argued demonstrated that  
22 the State engaged in prosecutorial misconduct and provided inadequate notice that he  
23 would have to defend himself against a felony charge rather than a misdemeanor petit  
24 larceny charge. An information filed on October 7, 2004, charged Morrison with  
25 burglary and “petit larceny (Felony–NRS 205.240).” However, the information  
26 advised Morrison that the State intended to seek habitual criminal status should he be  
27 found guilty of the primary offenses of burglary and petit larceny. NRS  
28 207.010(1)(a) provides that a person convicted of petit larceny “who has previously  
been two times convicted . . . of any crime which under the laws of the situs of the  
crime or of this State would amount to a felony . . . is a habitual criminal and shall be  
punished for a category B felony.” A habitual criminal adjudication pursuant to NRS  
207.010(1)(a) elevated the petit larceny charge to a class B felony, as reflected in the  
information. Counsel had no reason to object to the information on the grounds  
Morrison asserted in his petition. Therefore, we conclude that the district court did  
not err in summarily denying this claim.

1 Ex. 24, pp. 2-3 (#21-8, pp. 3-4) (citation omitted). See also Ex. 3 (#21-1, p. 1) (information).

2 Given that the information properly charged Petitioner, counsel could not have been ineffective  
3 because he did not challenge it. The Nevada Supreme Court reasonably applied Strickland.

4 Second, Petitioner claims that Jorgenson did not seek dismissal based upon a violation of  
5 Nevada's speedy trial law, Nev. Rev. Stat. § 178.556(1). On this issue, the Nevada Supreme Court  
6 held:

7 Morrison next argued that trial counsel was ineffective for not seeking dismissal of  
8 the information based on an alleged speedy trial violation. NRS 178.556(1) provides  
9 that a defendant should be brought to trial within 60 days after the arraignment on the  
10 indictment or information. Morrison's trial commenced 63 days after his  
11 arraignment. However, "the failure to set a trial within 60 days is not per se  
12 equatable to the denial of a speedy trial." Here, although Morrison asserted his right  
13 to a speedy trial and the delay appears to be related to the district court's schedule,  
14 [fn 8] the length of the delay was minimal and Morrison did not adequately explain  
15 any resulting prejudice. Consequently, we conclude that there was no reasonable  
16 probability that the result of his trial would have been different had counsel sought a  
17 dismissal on speedy trial grounds. Therefore, the district court did not err in  
18 summarily denying this claim.

19 [Footnote 8] The district court minutes reveal that the State and the defense  
20 were ready to proceed within 60 days of arraignment, but the district court  
21 referred Morrison's case to the overflow calendar and set the trial for  
22 December 20, 2004, 63 days after arraignment.

23 Ex. 24, pp. 3-4 (#21-8, pp. 4-5) (citations omitted). "[B]efore error for failure to accord a speedy  
24 trial can be raised on appeal, objection to the trial date set must have been made in the trial court."  
25 Anderson v. State, 477 P.2d 595, 598 (Nev. 1970). However, if Jorgenson had objected to the date,  
26 the result would not have been the dismissal of the action. Instead, the court either would have set  
27 the trial on an earlier date or explained why it could not set the trial on an earlier date. See Harris v.  
28 State, 466 P.2d 850, 852 (Nev. 1970). Either way, the outcome of the trial would not have differed.  
The Nevada Supreme Court reasonably applied Strickland.

Third, Petitioner argues that Jorgenson failed to challenge the validity of the search of his  
backpack. On this issue, the Nevada Supreme Court held:

Morrison asserted that his trial counsel was ineffective for not challenging the search  
of Morrison's backpack. Morrison acknowledged that he consented to a reasonable  
search of the backpack but that the search conducted was unreasonable because the  
items confiscated were unrelated to the charge for which he was being investigated.  
To succeed on a claim of ineffective assistance of counsel based on counsel's failure  
to seek suppression of allegedly illegally seized evidence, Morrison was required to  
establish prejudice by "showing that the claim was meritorious and that there was



1 reasonable likelihood that the exclusion of the evidence would have changed the  
2 result of the trial.”

3 Here, Morrison was taken into custody on suspicion of an unrelated offense of  
4 automobile burglary. During questioning, Morrison signed a consent form and orally  
5 granted detectives permission to search his backpack. Although detectives initially  
6 conducted the search to recover items related to the automobile burglary, they  
7 discovered a plastic bag containing women’s clothing with Macy’s department store  
8 price tags attached and no accompanying receipt. Subsequent investigation led to  
9 Morrison’s arrest and conviction for the instant offenses. Morrison testified on his  
10 own behalf at trial and made no allegation that the search conducted extended beyond  
11 that to which he consented. Even assuming trial counsel had challenged the  
12 constitutionality of the search of his backpack, we conclude that there was no  
13 reasonable probability that the result of his trial would have been different.  
14 Therefore, we conclude that the district court did not err in summarily denying this  
15 claim.

16 Ex. 24, pp. 4-5 (#21-8, pp. 5-6) (citations omitted). Once Petitioner consented to the search of the  
17 backpack, any items that the detectives found in their plain view are subject to seizure, even if those  
18 items did not have any relation to the automobile burglary under investigation. See Harris v. United  
19 States, 390 U.S. 234, 236 (1968). Jorgenson could not have succeeded with a motion to suppress  
20 the items taken from Macy’s. The Nevada Supreme Court reasonably applied Strickland.

21 Fourth, Petitioner argues that Jorgenson failed to secure an affidavit from Josie Bayudan,  
22 who represented Petitioner in an earlier criminal case. Petitioner alleges that Bayudan’s affidavit  
23 would support his claim of malicious prosecution because the prosecutor was angered at the  
24 acquittal of Petitioner in the automobile burglary case. On this issue, the Nevada Supreme Court  
25 held:

26 Morrison next argued that trial counsel was ineffective for failing to secure an  
27 affidavit from Josie T. Bayudan, who represented Morrison in another criminal  
28 matter (case no. C-205109). Morrison contended that Bayudan’s affidavit would  
have supported a claim of malicious prosecution because Bayudan was aware that the  
prosecutor in case no. C-205109, who also prosecuted Morrison in the instant action,  
was “pissed off” at Morrison as a result of his acquittal in that case. Morrison  
claimed that the prosecutor’s animosity toward him formed the impetus for the  
instant prosecution and that trial counsel was aware of the prosecutor’s feelings well  
before trial. However, even assuming the prosecutor expressed unhappiness about  
Morrison’s prior acquittal, we conclude that there was no reasonable probability,  
considering the evidence against him, that the result of his trial would have been  
different had trial counsel challenged the prosecution as Morrison desired.  
Therefore, we conclude that the district court did not err in summarily denying this  
claim.



Ex. 24, pp. 5-6 (#21-8, pp. 6-7). Petitioner was bound over to the state district court on October 4, 2004. Ex. 3 (#21, p. 15). He was arraigned in district court in this case on October 18, 2004. Ex. 4 (#21-1, p. 5). He was tried and acquitted in the automobile burglary case no. C-205109, on November 24, 2004. The prosecutor might not have been pleased that Petitioner was acquitted in case no. C-205109, but a claim that the prosecution in this case was motivated by the loss in the other case would require the prosecutor to have seen into the future. An affidavit would not have changed the result of Petitioner's trial in this case. The Nevada Supreme Court reasonably applied Strickland.

Fifth, Petitioner argues that Jorgenson failed to object to the judge's incorrect statement on the burden of proof. In his state habeas corpus appeal, the Nevada Supreme Court held:

Morrison argued that counsel was ineffective for failing to object to an improper reasonable doubt instruction at the beginning of the trial. On direct appeal, we concluded that the instruction was erroneous, but that Morrison suffered no prejudice considering the district court's subsequent proper instructions respecting reasonable doubt and the burden of proof. Here, we conclude that there was no reasonable probability that the result of his trial would have been different even if counsel had objected to the district court's initial instruction. Therefore, the district court did not err in summarily denying this claim.

Ex. 24, p. 6 (#21-8, p. 7) (footnote omitted). On direct appeal, the Nevada Supreme Court held:

Here, while explaining the trial process, the district court initially advised the jury that after applying the law to the facts, it would decide "whether the State has met its burden in proving the defendant guilty or not guilty beyond a reasonable doubt." Every defendant is cloaked with the presumption of innocence until the contrary is proved by competent evidence beyond a reasonable doubt. We conclude that the district court's advisement was erroneous and that it was plain and clear. However, to warrant relief, the error must affect Morrison's substantial rights. At the conclusion of the evidence, the district court properly instructed the jury:

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

The district court further instructed the jury on the statutory definition of reasonable doubt. Despite the district court's initial erroneous advisement respecting the State's burden of proof, we conclude that this error did not affect Morrison's substantial rights in light of the district court's subsequent proper instructions. Therefore, we deny relief on this issue.

1 Ex. 17, pp. 2-3 (#21-5, pp. 21-22) (citations omitted). Even though Jorgenson did not object, the  
2 Nevada Supreme Court did consider on direct appeal the incorrect statement of the burden of proof.  
3 Its determination in the state habeas corpus proceedings that Petitioner suffered no prejudice from  
4 the lack of objection was a reasonable application of Strickland.

5 In a long list, Petitioner raised many other issues of ineffective assistance of trial counsel.  
6 Ex. 19 (#21-6, pp. 22-24). He raises the same issues in his Petition (#2). On these issues, the  
7 Nevada Supreme Court held:

8 Morrison also contended that his trial counsel was ineffective for the following  
9 reasons: counsel did not discuss a defense strategy with Morrison; counsel did not  
10 subpoena or interview potential witnesses; counsel refused to file various pretrial  
11 motions; counsel did not request a hearing to explore the validity of Morrison's prior  
12 convictions; counsel failed to appear at sentencing without explanation; [fn 13]  
13 counsel did not inform Morrison of his right to appeal or file an appeal; [fn 14]  
14 counsel allowed Morrison to testify knowing that Morrison was taking psychotropic  
15 drugs; counsel made an attempt to validate Morrison's claim that he was mentally  
16 impaired; counsel refused to provide Morrison with copies of police reports; counsel  
17 failed to object to repeated badgering during the prosecutor's cross-examination of  
18 Morrison; counsel failed to object to Morrison not being allowed to view  
19 surveillance video introduced at trial; counsel did not use a list of questions Morrison  
20 provided him; the prosecution attempted to introduce evidence not disclosed during  
21 discovery; counsel failed to object to the prosecutor's running narrative during the  
22 jury's viewing of a surveillance videotape; counsel failed to identify clear  
23 inconsistencies in the testimony of the State's witnesses; counsel appeared at trial  
24 tired, unkempt, distastefully dressed, disinterested and detached; and counsel  
25 improperly introduced a question regarding prior bad acts. However, these claims  
26 are either belied by the record or not adequately supported by specific factual  
27 allegations demonstrating prejudice. Therefore, we conclude that the district court  
28 did not err in summarily denying these claims.

19 [Footnote 13] Gary Guymon represented Morrison at sentencing.

20 [Footnote 14] Howard Brooks and Robert Miller represented Morrison in his  
21 direct appeal, which this court considered. See Morrison, Docket No. 44719.

22 Ex. 24, pp. 6-7 (#21-8, pp. 7-8). Given that most of his claims of ineffective assistance in his state  
23 petition were conclusory, without any allegations of fact, and given Strickland's requirement that  
24 Petitioner prove that counsel performed deficiently and prejudiced him, that was a reasonable  
25 application of Strickland.

26 Next in Ground 3, Petitioner argues that his counsel at sentencing, Gary Guymon, was  
27 ineffective. In his state habeas corpus appeal, the Nevada Supreme Court held:

Morrison next argued that Gary Guymon, who represented Morrison at sentencing, was ineffective for speaking harshly to him and for infuriating the district court by “stammering for approximately two to three minutes, resulting in Morrison receiving a lengthy prison sentence.” The trial transcript shows that at the outset the district court was disturbed by Morrison’s lengthy criminal history. Counsel attempted to persuade the district court not to adjudicate Morrison a habitual criminal considering his positive work history, that his prior convictions were all theft-related and non-violent, and that the thefts were motivated by Morrison’s drug use. We conclude that Morrison failed to demonstrate that he was entitled to an evidentiary hearing on these issues. Further, even assuming counsel communicated harshly with Morrison, no discernable prejudice resulted from it. Consequently, we conclude that the district court did not err in summarily denying this claim.

Ex. 24, pp. 7-8 (#21-8, pp. 8-9). The transcript of the sentencing hearing confirms the Nevada Supreme Court’s holding regarding Guymon’s argument and the judge’s concern with Petitioner’s criminal history. Ex. 6 (#21-3, p. 1). Furthermore, Petitioner has not demonstrated any prejudice resulting from Guymon speaking harshly to him. The Nevada Supreme Court reasonably applied Strickland.

Petitioner also claims that Guymon inappropriately waived Petitioner’s presence at a hearing on his state habeas corpus petition. Petitioner did not present this claim to the Nevada Supreme Court, but the Court can deny the claim on its merits despite the failure to exhaust. 28 U.S.C. § 2254(b)(2). Apparently, the state district court conducted a hearing on Petitioner’s habeas corpus petition outside of his presence. Petitioner’s Ex. I (#2-1, p. 20). Petitioner has no right to appointed counsel, and thus no right to effective assistance of counsel, in state post-conviction proceedings.<sup>3</sup> Pennsylvania v. Finley, 481 U.S. 551 (1987).

Finally in Ground 3, Petitioner claims that his appellate attorneys were ineffective. On this issue, the Nevada Supreme Court held:

Morrison contended that his appellate counsel, Howard S. Brooks was ineffective for failing to communicate with him during his appeal. However, Brooks eventually withdrew as Morrison’s counsel and Morrison did not adequately explain how he was prejudiced by Brooks’ representation. Consequently, we conclude that the district court did not err in summarily denying this claim. After Brooks’ withdrawal as counsel, Robert Miller was appointed to represent Morrison in his direct appeal. Morrison complained that Miller was ineffective for failing to adequately

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<sup>3</sup>This assumes that Guymon was representing Petitioner in the state habeas corpus proceedings. Despite the transcript of the hearing listing Guymon as Petitioner’s lawyer, Petitioner’s state habeas corpus petition was pro se. See Ex. 19 (#21-6, p. 1).

1 communicate with him during the appellate process and in declining to raise matters  
2 Morrison wanted included in his appeal. He did not identify in his petition below  
3 what issues he desired Miller to raise or adequately explain how his dissatisfaction  
with Miller prejudiced his appeal. Consequently, we conclude that the district court  
did not err in summarily denying this claim.

4 Ex. 24, pp. 8-9 (#21-8, pp. 9-10) (citation omitted). Petitioner's state habeas corpus petition does  
5 not allege what issues he wanted appellate counsel to raise, let alone whether those issues had any  
6 probability of success. The Nevada Supreme Court reasonably applied Strickland.

7 Petitioner raises several claims of ineffective assistance of appellate counsel that he did not  
8 raise before the Nevada Supreme Court. The Court can deny them on the merits despite the failure  
9 to exhaust. 28 U.S.C. § 2254(b)(2). First, he claims that Miller continued to represent him despite  
10 being fired. Petitioner has not alleged any prejudice that he suffered from Miller continuing to  
11 represent him. Furthermore, Respondents correctly note that Petitioner, being unable to afford his  
12 own attorney, does not have a choice of counsel to represent him. United States v. Gonzalez-Lopez,  
13 548 U.S. 140, 151 (2006) (citing Caplin & Drysdale v. United States, 491 U.S. 617, 624 (1989), and  
14 Wheat v. United States, 486 U.S. 153, 159 (1988)).

15 Second, Petitioner alleges that Miller failed to file a supplement to his direct appeal brief.  
16 Petitioner did not present the proposed supplement to the Nevada Supreme Court in his state habeas  
17 corpus petition, thus leading to the ruling, quoted above, that he did not identify what issues he  
18 wanted counsel to raise on direct appeal. Petitioner possessed the proposed supplement and could  
19 have submitted it with his state habeas corpus petition, because during his direct appeal the clerk of  
20 the Nevada Supreme Court had sent it back to him unfiled. Petitioner failed to develop the factual  
21 basis of this claim in his state habeas corpus proceedings, and thus he cannot expand the record to  
22 include his proposed supplement in this Court. Cooper-Smith, 397 F.3d at 1241; 28 U.S.C.  
23 § 2254(e)(2).

24 Third, Petitioner alleges that Miller sent Petitioner a letter, along with a copy of the direct  
25 appeal order that stated that Petitioner raised three issues on appeal. See Ex. 17 (#21-5, p. 20).  
26 Petitioner claims that the Nevada Supreme Court's statement is inaccurate because Miller failed to  
27 comply with Petitioner's demand to file the supplement to the opening brief. The Court has ruled  
28 on the issue of the supplement, just above. Petitioner has demonstrated neither deficient

1 performance nor prejudice because Miller sent him a letter and copy of the Nevada Supreme Court's  
2 order.

3 Fourth, Petitioner alleges that Miller filed all of his briefs late. The Nevada Supreme Court  
4 considered all of the grounds that Miller raised on their merits and did not dismiss anything for  
5 failure to comply with filing deadlines. See Ex. 17 (#21-5, p. 18). Even if Miller did file briefs late,  
6 Petitioner suffered no prejudice.

7 The Court concludes that reasonable jurists would not find the Court's dispositions of all  
8 grounds, including those dismissed earlier in the proceedings, to be debatable, and the Court will  
9 not issue a certificate of appealability.

10 IT IS THEREFORE ORDERED that the Petition for a Writ of Habeas Corpus Pursuant to  
11 28 U.S.C. § 2254 (#2) is **DENIED**. The Clerk of the Court shall enter judgment accordingly.

12 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

13 DATED this 12<sup>th</sup> day of March, 2010.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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